KB Thurausisingham v Dr Mrs Vijayalakshmi Sivaprakasapillai

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2–22–489 OF 1996
AZMEL J
13 JUNE 2007

Succession — Administration — Claim that deceased was beneficial owner of piece of land — 4/96 share of estate — Whether there was binding agreement between parties

Succession — Administration — Locus standi — Whether plaintiff had locus standi to commence action — Whether plaintiff could commence action in personal capacity —

Succession — Administration — Whether beneficial interest to estate had accrued — When did interest arise

AE Clough and his wife bequeathed the Karai Nagar estate to their four children equally. The children sold 50% of the estate to MTCM Corporation Pte Ltd. One of the children, Dato' Sir Clough Thuraisingham, renounced his 12/96 share and distributed it equally amongst the three others. After several transactions, Rajini Meenachi Thuraisingham (the daughter/heir of one of the children) held a 16/96 share. Rosa Alagamany ('the deceased') held a 19/96 share. The deceased and Rajini were trustees of the estate of AE Clough. The deceased entered into a contract with Rajini to transfer her 4/96 share of Dato' Sir Clough Thuraisingham to the estate of Dato' Sir Clough Thuraisingham. But no transfer was effected. The plaintiff is the husband of Rajini. The plaintiff claimed that the deceased's son GGP and the defendant agreed to hold for the benefit of the plaintiff and the heirs of the estate of Dato' Sir Clough Thuraisingham the 4/96 share. However, when the deceased died, GGP applied for letters of administration for the entire 19/96 share of the deceased. The plaintiff filed a caveat in respect of the 4/96 share. This led to the High Court granting letters of administration to GGP for only 15/96 share of the estate of the deceased whilst the ownership of the 4/96 share were to proceed to trial pursuant to O 72 of the Rules of the High Court 1980. The plaintiff filed this action against GGP. Upon his death, the defendant was substituted in his place. By this action, the plaintiff sought inter alia a declaration that the 4/96 share of the Karai Nagar estate that was part of the deceased's 19/96 share belonged to the plaintiff and his co-heirs. The issues in this action were: (1) whether the letters constituted a binding contract between the plaintiff and GGP; (2) whether the plaintiff had locus standi to commence this action; and (3) when did the beneficial interest of GGP in the deceased's estate accrue.

Held, dismissing the plaintiff's claim:

(1) During cross-examination the plaintiff confirmed that the agreement dated

21 October 1980 had been terminated by Rajini. The enforceability of the letter of 9 June 1991 would depend on the existence and validity of the letter of 21 October 1980. With the termination of the 21 October 1980 letter, as admitted by the plaintiff, the letter of 9 June 1991 could no longer be enforced (see para 18).

(2) The plaintiff's locus in this action was based on two letters dated 9 June 1991 and 3 July 1991. Both letters were written by GGP to Rajini and not to the plaintiff. Clearly the plaintiff was not a party to the transaction and therefore there was no privity of contract between GGP and the plaintiff. Hence the plaintiff had no locus standi to commence this action against the defendant. The position might have been different if the plaintiff had commenced this action on behalf of the other heirs of Dato' Sir Clough Thuraisingham. If he had acted in a representative capacity his locus would not have become an issue. But the plaintiff commenced this action in his personal capacity. It was not shown before the court that the plaintiff had the authority of the other heirs of Dato' Sir Clough Thuraisingham to bring this action (see para 21).

(3) A beneficiary under intestacy has no interest or property in the personal estate of the deceased until the estate had been fully administered and the distribution made. In the instant case, the letter of 9 June 1991 was written when the deceased was still alive. It was also written at a time when the estate had not been fully administered. Thus GGP could not have the lawful authority to write the two letters on behalf of the deceased, himself or his sister. The plaintiff had no cause action against the defendant based on the two letters (see para 27).

[Bahasa Malaysia summary

AE Clough dan isterinya telah mewasiatkan harta pusaka Karai Nagar kepada empat orang anak mereka secara sama rata. Anak-anak tersebut telah menjual 50% daripada harta pusaka itu kepada MTCM Corporation Pte Ltd. Salah seorang daripada anak tersebut, Dato' Sir Clough Thuraisingham, melepaskan 12/96 sahamnya dan mengagihkan sama rata kepada tiga yang lain. Setelah beberapa transaksi, Rajini Meenachi Thuraisingham (anak perempuan/pewaris salah seorang anak-anak tersebut) memegang 16/96 saham. Rosa Alagamany ('si mati') memegang 19/96 saham. Si mati dan Rajini merupakan pemegang amanah harta pusaka AE Clough. Si mati telah memasuki satu kontrak dengan Rajini untuk memindah milik sahamnya sebanyak 4/96 daripada Dato' Sir Clough Thuraisingham kepada harta pusaka Dato' Sir Clough Thuraisingham. Namun tiada pindah milik telah dilaksanakan. Plaintif merupakan suami Rajini. Plaintif mendakwa bahawa anak lelaki si mati GGP dan defendan bersetuju untuk memegang saham 4/96 tersebut bagi faedah plaintif dan pewaris-pewaris harta pusaka Dato' Sir Clough Thuraisingham. Bagaimanapun, apabila si mati meninggal dunia, GGP memohon untuk surat-surat pentadbiran bagi keseluruhan saham 19/96 daripada si mati. Plaintif telah memfailkan satu kaveat berkaitan 4/96 saham itu. Berikutan itu Mahkamah Tinggi telah memberikan surat-surat pentadbiran kepada GGP untuk hanya 15/96 saham daripada harta pusaka si mati manakala milikan 4/96 saham dikemukakan untuk perbicaraan menurut A 72 Kaedah-Kaedah Mahkamah Tinggi

1980. Plaintif telah memfailkan tindakan ini terhadap GGP. Apabila beliau meninggal dunia, defendan telah menggantikan tempatnya. Melalui tindakan ini, plaintif memohon antara lain satu deklarasi bahawa 4/96 saham harta pusaka Karai Nagar yang merupakan sebahagian daripada 19/96 saham si mati dimiliki oleh plaintif dan pewaris-pewaris bersamanya. Persoalan-persoalan dalam tindakan ini adalah: (1) sama ada surat-surat tersebut mengandungi satu kontrak yang mengikat antara plaintif dan GGP; (2) sama ada plaintif mempunyai locus standi untuk memulakan tindakan ini; dan (3) bila kepentingan benefisiari GGP dalam harta pusaka si mati terakru.

Diputuskan, menolak tuntutan plaintif:

(1) Semasa pemeriksaan balas plaintif mengesahkan bahawa perjanjian bertarikh 21 Oktober 1980 telah ditamatkan oleh Rajini. Penguatkuasaan surat-surat 9 Jun 1991 bergantung kepada kewujudan dan kesahan surat-surat 21 Oktober 1980. Dengan penamatan surat 21 Oktober 1980 itu, seperti diakui oleh plaintif, surat 9 Jun 1991 tidak lagi berkuat kuasa (lihat perenggan 18).

(2) Locus plaintif dalam tindakan ini adalah berdasarkan dua surat bertarikh 9 Jun 1991 dan 3 Julai 1991. Kedua-dua surat tersebut ditulis oleh GGP kepada Rajini dan bukan kepada plaintif. Jelas plaintif bukan satu pihak kepada transaksi tersebut dan oleh itu tiada priviti kontrak antara GGP dan plaintif. Justeru itu plaintif tiada locus standi untuk memulakan tindakan ini terhadap defendan. Kedudukan mungkin berbeza jika plaintif telah memulakan tindakan ini bagi pihak pewaris-pewaris lain Dato' Sir Clough Thuraisingham. Jika beliau bertindak dalam kapasiti representasi locusnya tidak menjadi isu. Namun plaintif telah memulakan tindakan ini dalam kapasiti peribadinya. Tidak dikemukakan ke hadapan mahkamah yang plaintif mempunyai kuasa terhadap pewaris-pewaris lain Dato' Sir Clough Thuraisingham untuk memulakan tindakan ini (lihat perenggan 21).

(3) Seorang benefisiari dalam kematian yang tidak berwasiat tidak mempunyai kepentingan atau hartanah dalam harta pusaka peribadi si mati sehingga harta pusaka itu telah ditadbir sepenuhnya dan pembahagian dibuat. Dalam kes semasa, surat 9 Jun 1991 telah ditulis apabila si mati masih hidup. Ia juga telah ditulis semasa harta pusaka belum ditadbirkan sepenuhnya. Oleh itu GGP tidak mungkin mempunyai kuasa sah untuk menulis dua surat tersebut bagi pihak si mati, beliau sendiri atau kakaknya. Plaintif tidak mempunyai kausa tindakan terhadap defendan berdasarkan dua surat tersebut (lihat perenggan 27).]

Notes

For a case on a claim that deceased was beneficial owner of piece of land, see 11 *Mallal's Digest* (4th Ed, 2005 Reissue) para 2170.

For a case on locus standi generally, see 11 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2181–2182.

Cases referred to

Chor Paik Har v Farlim Properties Sdn Bhd [1997] 3 MLJ 188 (refd)

Legislation referred to

Contracts Act 1950 s 26
Rules of the High Court 1980 O 72

HK Ling (Iza Ling & Mok) for the plaintiff.
Bharti Seth (Bharti Seth & Associates) for the defendant.

Azmel J (now FCJ):

[1] In this case, the plaintiff claimed against the Defendant as follows:

(i) a declaration that the 4/96 share of the Karai Nagar estate that is part of the deceased's 19/96 share belongs to the plaintiff and his co-heirs to which they are legitimately and legally entitled to;

(ii) the said 4/96 share is to vest with the plaintifff and his co-heirs;

(iii) the appropriate entries are made in the records of the Land Registry; and

(iv) costs to be borne by the defendant.

[2] The brief facts are as follows. On 1 February 1937, Albert Edward Clough ('AE Clough') and his wife Clara Meenachi Clough executed their joint last will which they bequeathed the Karai Nagar Estate to their four children equally:

(a) Samuel Clough Balasingham;

(b) Dato' Sir Clough Thuraisingham;

(c) Rosa Alagamany; and

(d) Matilda Maheswary Pathmanathan.

[3] By virtue of an agreement in 1946, the four beneficiaries sold 50% of the estate to MTCM Corporation Pte Ltd ('MTCM'). As a result MTCM held 48/96 share of the said estate and each beneficiary then held 12/96 share of the estate.

[4] Prior to 1979, Dato' Sir Clough Thuraisingham renounced his 12/96 share and distributed it equally amongst the three other beneficiaries.

[5] In 1959, Rosa Alagamany before her death (the deceased) purchased 3/96 share of the estate of Samuel Clough Balasingham and with such transaction the current shareholding of the Karai Nagar estate were as follows:

(i) Estate of Samuel Clough Balasingham — 13/96 share;

(ii) Estate of Rosa Alagamany (the deceased) —19/96 share;

(iii) Rajini Meenachi Thuraisingham (heir/daughter of Matilda Maheswary Pathmanathan and also the wife of the plaintiff) — 16/96 share; and

(iv) MTCM Corporation — 48/96 share.

[6] Rajini Meenachi Thuraisingham ('Rajini'), wife of KB Thuraisingham, the plaintiff in this case, is the heir/daughter of Matilda Maheswary Pathmanathan. Rajini and the deceased were appointed the trustees of the AE Clough estate.

[7] On 21 October 1980, the deceased entered into a contract with Rajini to transfer 4/96 share of Dato' Sir Clough Thuraisingham which he had earlier renounced, to the estate of Dato' Sir Clough Thuraisingham for RM20,000. However, no transfer was effected.

[8] By virtue of a letter dated 9 June 1991, the deceased's son Gaasinather Gangaser Ponnabalam ('GGP') on behalf of the deceased and the Defendant agreed to hold for the benefit of the plaintiff and the heirs of Dato' Sir Clough Thuraisingham's estate, the 4/96 share of the Karai Nagar estate (the said 4/96 share) which according to the plaintiff tantamounts to a contract between the Defendant and plaintiff for the transfer of the said 4/96 share. The subsequent failure to effect the transfer amounts to a breach of the terms and conditions of the letter dated 9 June 1991.

[9] Rosa Alagamany (the deceased) died intestate on 2 January 1992. GGP then applied for letters of administration in respect of the 19/96 share of the deceased.

[10] On 8 November 1993 plaintiff filed a caveat in Kuala Lumpur High Court in respect of the said 4/96 share. This led to the Kuala Lumpur High Court on 21 August 1996 granting the letters of administration to GGP in respect of only 15/96 share of the estate of the deceased whilst the ownership of the remaining 4/96 share were to proceed for trial pursuant to O 72 of the Rules of the High Court 1980 ('the RHC'). It was on the basis of this matter that the plaintiff filed this action against the defendant in 1996. After the death of GGP on 5 January 2000 GGP's sister Dr Mrs Vijayalakshmi Sivaprakasapillai was substituted as the Defendant.

[11] The disputes between the plaintiff and the defendant can be adequately determined by addressing three main issues namely:

(a) whether the letters dated 9 June 1991 and 3 July 1991 constitute a binding contract between the plaintiff and GGP;

(b) whether the plaintiff has locus standi to commence this action; and

(c) when did the beneficial interest of GGP in the deceased's estate accrue.

[12] At the hearing two witnesses were called for the plaintiff, namely the plaintiff himself (PW1) and one Mr Ng Lian Hue @ Ng Lian Hooi (PW2) a licensed surveyor, while the defendant only called Dr Mrs Vijayalakshmi Sivaprakasapillai (DW1).

[13] As regards the first issue, it is my finding that the letters dated 9 June 1991 and 3 July 1991 did not constitute a binding contract between plaintiff and GGP. Paragraph (b) of the letter of 9 June 1991 which clearly states:

> Re the paragraph pertaining to my mother's (and my sister's and my) stand on the portion of the renounced share of Dato' Sir Clough Thuraisingham that will devolve on my mother

(or my sister and myself): We confirm that we are prepared to transfer such portion that so devolves on my mother (or my sister and myself) to the heirs of the late Dato' Sir Clough Thuraisingham. At such stage all income on the devolved share will also be naturally paid to the heirs from that date onwards. *This is in consideration of the heirs of Dato' Sir Clough Thuraisingham not claiming any income declared prior to the date of transfer* from my mother or myself or my sister and that no further cases are instituted against my mother or my sister and myself by the heirs of Dato' Sir Clough Thuraisingham in respect of any matters pertaining to the estate of AE Clough, the Trust or Karai Nagar Estate. (Emphasis added.)

[14] Based on the content of the above paragraph, the heirs of Dato' Sir Clough Thuraisingham would not be entitled to claim any income prior to the date of transfer of the said 4/96 share. Strangely enough it was the plaintiff himself who had instructed Boustead to pay him income in respect of the said 4/96 share and the plaintiff had received the same. Needless to say the payment was effected without consideration. The letter dated 5 July 1995 written by Boustead addressed to GGP confirmed such instruction to pay issued by the plaintiff. It reads:

From 1991 to June 1994 profits in respect of AE Clough's Trust were *paid in the name of C Thuraisingham and Co client's account as instructed by KB Thuraisingham*. Profits for the period July 1994 to December 1994 were payable to KB Thuraisingham as trustee, as a bank account for this purpose has been opened. (Emphasis added.)

[15] Based on the above letter I ruled that GGP had not given any instructions to Boustead to make payment to the plaintiff. It was instructed by the plaintiff himself. s 26 of the Contracts Act 1950 states that:

An agreement made without consideration is void, unless:...' (a) it is made on account of affection and love, (b) it is a promise to compensate, (c) it is a promise to pay debt.

Thus, applying s 26 to this one issue, the payment to the plaintiff was void for want of consideration. And it could not come under any of the three exceptions of s 26 of the Contracts Act 1950.

[16] The plaintiff contended that the agreement dated 21 October 1980 entered into between the deceased and Rajini with a view to transfer the said 4/96 share back to the estate of Dato' Sir Clough Thuraisingham for RM20,000 was connected to the 9 June 1991 letter. However, no transfer was effected.

[17] During the trial, the plaintiff contended that the deceased's intention to give the said 4/96 was stated in this agreement (21 October 80). However on p 13 of the notes of evidence, the plaintiff admitted the alleged agreement was not mentioned in his pleadings:

I agree that there was no mention of the 21 October 1980 agreement in the statement of claim. There was also no mention in the letter dated 9 June 1991 of the 21 October 1980 agreement.

The plaintiff went on to say at p 26:

I agree that there was no documentary evidence that the 21 October 1980 agreement was amended by 9 June 1991 agreement.

In view of his failure to mention the alleged agreement in the pleadings, the plaintiff is not allowed to raise it during the trial.

[18] And during his cross-examination the plaintiff also confirmed that the agreement dated 21 October 1980 had been terminated by Rajini. The enforceability of the letter of 9 June 1991 would depend on the existence and validity of the letter of 21 October 1980. With the termination of the 21 October 1980 letter, as admitted by the plaintiff, the letter of 9 June 1991 could no longer be enforced.

[19] In respect of another agreement entered into between the plaintiff and Prisma Pelangi Sdn Bhd on 9 November 1993, the plaintiff contended that he was entitled to the said 4/96 share from the heirs of the deceased pursuant to an executed contract. During cross-examination, the plaintiff referred to the executed contract as the agreement dated 21 October 1980. As mentioned earlier this agreement had been terminated and the plaintiff could no longer validly rely on it. This argument is completely without any merit.

[20] For the reasons as mentioned above, I ruled that the letters dated 9 June 1991 and 3 July 1991 did not constitute a binding contract between the plaintiff and GGP.

[21] As regard the second issue, the plaintiff's locus in this action was based on two letters dated 9 June 1991 and 3 July 1991. Both letters were written by GGP to Rajini (plaintiff's wife) and not to the plaintiff. Clearly the plaintiff was not a party to the transaction and therefore there was no privity of contract between GGP and the plaintiff. Hence the plaintiff had no locus standi to commence this action against the Defendant. The position might have been different if the plaintiff had commenced this action on behalf of the other heirs of Dato' Sir Clough Thuraisingham. If he had acted in a representative capacity his locus would not have become an issue. But the plaintiff commenced this action in his personal capacity. It was not shown before me that the plaintiff had the authority of the other heirs of Dato' Sir Clough Thuraisingham to bring this action.

[22] It must also be noted that the plaintiff had admitted in evidence that his father had made a will on 30 December 1970 and no reference was made to Karai Nagar estate. The plaintiff also admitted that his late father did not take any steps to set aside his decision renouncing his share in the estate. Based on the reasons as stated above it is my conclusion that the plaintiff had no locus standi to commence this action against the Defendant.

[23] As regard the 3rd and final issue, it must be noted that at the time when the letter of 9 June 1991 was written when Rosa Alagamany (the deceased) was still alive. And at the time when she wrote the letter the said 4/96 share had yet to be devolved on to the deceased nor having it registered in her name. It was only pursuant to a consent order issued by the Kuala Lumpur High Court No S6–24–1365–90 dated 12 June 1991 that the distribution of the partition of the lands in Karai Nagar estate was alleged to have taken place and the deceased was recorded as holding a 19/96 portion.

[24] Therefore, in the circumstances as stated above I am of the view GGP had no lawful authority whatsoever to deal with the shares of the deceased at the time when she was still alive.

[25] In *Probate and Administration in Singapore and Malaysia*: *Law and Practice* by G Raman, p 6 states that:

> When a person dies, his legal persona ceases. A dead man cannot carry out any act In intestacies his affairs come to a standstill. This is because unless letters of administration have been applied for and obtained, there is no one who has the power or authority to act on behalf of the deceased.

[26] In the case of *Chor Paik Har v Farlim Properties Sdn Bhd* [1997] 3 MLJ 188, Mohamed Dzaiddin FCJ (as he then was) stated clearly the position of a beneficiary's interest under an intestacy as follows:

> It must be observed at the outset that there is no clear authority for the proposition that a beneficiary under an intestacy has no interest in the property of a deceased person until the estate has been fully administered. In our view, however, there is much persuasive force in what is stated in the textbook on *The Law and Practice of Intestate Succession* by CH Sherrin and Bonehill. At p 93, the learned authors opined as follows:
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> > Questions accordingly arise as to the nature of the beneficiary's interest under an intestacy during the course of administration. Has he for instance, an interest which is capable of being bequeathed by his will or of being disclaimed?
> >
> > There is considerable authority on this point and the answer to the questions posed are to be found in the House of Lords decisions in *Lord Sudeley v The Attorney General* [1987] AC 11 and *Dr Barnado's Homes National Incorporated Association v Commissioners For Special Purposes of the Income Tax Acts* [1921] AC 1 and in the Privy Council decision in *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] AC 694. Although these cases were all concerned with testate succession, the principles stated are usually regarded as being applicable equally to the nature of a beneficiary's right on intestacy. The basic principle appears from the *Barnado*'s case, where it was clearly stated:
> >
> > > When the personal estate of a testator has been fully administered by his executors and the net residue ascertained, the residuary legatee is entitled to have the residue as so ascertained, with any accrued income, transferred and paid to him: but until that time, he has no property in any specific investment forming part of the estate or in the income from any such investment, and both corpus and income are the property of the executors and are applicable by them as a mixed fund for the purposes of administration.

[27] Based on the above authority I arrived at the conclusion that a beneficiary under intestacy has no interest or property in the personal estate of the deceased until the estate had been fully administered and the distribution made. In the instant case, the letter of 9 June 1991 was written when the deceased was still alive. It was also written at a time when the estate had not been fully administered. Thus GGP could not have the lawful authority to write the two letters on behalf of the deceased, himself or his sister. I therefore ruled that the plaintiff had no cause action against the defendant based on the two letters.

[28] The plaintiff had given testimony that at the time when the letters were written the deceased was non-compose mentis and that GGP was appointed curator for the deceased's property by a Sri Lankan court thereby giving GGP had the authority to write the above said letters. But that was just an allegation. No evidence was given to prove that GGP was in fact appointed as curator. Further the plaintiff did not make enquiries to verify this fact. I therefore ruled that there was no merit whatsoever in this allegation.

[29] In the circumstances and the reasons that I have stated above, I dismiss the plaintiff's claim with costs.

Plaintiff's claim dismissed.

Reported by Brendan Navin Siva